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Accord on Fire and Building Safety in Bangladesh: An International Response to Bangladesh Labor Conditions

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Accord on Fire and Building Safety in Bangladesh: An International Response to Bangladesh Labor Conditions

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Accord on Fire and Building Safety in Bangladesh: An International Response to Bangladesh Labor Conditions

Benjamin A. Evans[†]

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I. Introduction

On April 24, 2013, the Rana Plaza building in Savar, Bangladesh, collapsed, killing 1,133 people.¹ Though the building was not intended for industrial use, the owner had illegally expanded it in order to rent space to garment factories.² The day before the collapse, cracks had appeared in the building's walls.³ An engineer was called to investigate and determined that the

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¹ Press Release, Accord on Fire and Building Safety in Bangladesh, Accord Statement Upon the Six-Month Anniversary of the Rana Plaza Disaster (Oct. 24, 2013), available at <http://www.bangladeshaccord.org/2013/10/six-month-rana-plaza-disaster-anniversary/#more-500>.

² *Building Materials Blamed in Bangladesh Disaster*, ASSOCIATED PRESS, May 23, 2013, <http://bigstory.ap.org/article/building-materials-blamed-bangladesh-disaster>.

³ *Id.*

building was unsafe.⁴ Although the building was closed to shoppers, the workers were ordered into the factories.⁵ The walls fell in shortly after the workday started.⁶

In response to this and other disasters within the Bangladesh garment industry, international retailers joined with unions and non-governmental organizations (NGOs) to create the Accord on Fire and Building Safety in Bangladesh (the "Accord").⁷ The Accord is a legally binding agreement among the retailers supplied by Bangladesh garment factories to create and fund a system for factory inspection and repair.⁸ The Accord is overseen by a steering committee made up of equal members representing the signing retailers and trade unions,⁹ chaired by a neutral representative chosen by the International Labour Organization (ILO).¹⁰ The signing retailers provide funding for the administration of the Accord.¹¹ Signing companies are also required to ensure available funding for factory repairs, either through direct payments to supplying factories; loans; renegotiating terms with suppliers; or soliciting donations from NGOs or government bodies.¹²

Though it is not a perfect agreement,¹³ the Accord is an important step forward in ensuring responsible labor practices in

⁴ Jim Yardley, *Report on Bangladesh Building Collapse Finds Widespread Blame*, N.Y. TIMES, May 22, 2013, <http://www.nytimes.com/2013/05/23/world/asia/report-on-bangladesh-building-collapse-finds-widespread-blame.html>.

⁵ See ASSOCIATED PRESS, *supra* note 2.

⁶ See Yardley, *supra* note 4.

⁷ See ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, May 13, 2013, available at http://www.bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf [hereinafter Accord].

⁸ See FAQs, ACCORD ON FIRE & BUILDING SAFETY BANGLADESH, <http://www.bangladeshaccord.org/faqs/> (last visited Oct. 10, 2013).

⁹ The terms of the Accord allow a maximum of three representatives from each group. Decisions of the board are made by majority vote. Accord, *supra* note 7, at para. 4.

¹⁰ The ILO is a U.N. agency with 185 member states, dedicated to improving labor practices by creating a debate between governments, employers, and worker representatives. *Tripartite Constituents*, INT'L LAB. ORG., <http://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.htm> (last visited Feb. 8, 2014).

¹¹ FAQs, *supra* note 8.

¹² *Id.*

¹³ See *infra* Part VI.

Bangladesh. The garment industry dominates Bangladesh's economy. Clothing accounts for four-fifths of the country's exports—a value of twenty-two billion dollars.¹⁴ Despite its relatively small size, Bangladesh is the world's second-highest garment exporter.¹⁵ Bangladesh has become popular in the garment industry because it is so inexpensive. Retailers pay only a tiny fraction of the retail price of their garments, and to support this, suppliers pay low wages and cut corners in terms of safety.¹⁶ However, Bangladesh has been slow to address these wage and safety concerns, because many politicians are tied to the garment industry.¹⁷ The Accord appropriately shares the responsibility of improving labor conditions between the government and those who have profited most from the system by legally binding retailers to their third-party suppliers.

Part II of this Comment will describe the circumstances necessitating the creation of the Accord. Part III will detail the requirements the Accord imposes on its members. Part IV will discuss the Bangladesh agreement that affects the Accord, the National Tripartite Plan of Action on Fire Safety and Structural Integrity in the Ready-Made Garment Sector in Bangladesh. Part V will discuss the recent United States Supreme Court decision *Kiobel v. Royal Dutch Petroleum Co.*,¹⁸ which would likely limit

¹⁴ Shyamantha Asokan, *Bangladesh Poised to Hike Garment Wages, But May Not End Strikes*, REUTERS, Oct. 21, 2013, <http://www.reuters.com/article/2013/10/21/us-bangladesh-garments-wage-idUSBRE99K02M20131021>.

¹⁵ Only China exports more garments. Julfikar Ali Manik & Jim Yardley, *Building Collapse in Bangladesh Leaves Scores Dead*, N.Y. TIMES, Apr. 24, 2013, <http://www.nytimes.com/2013/04/25/world/asia/bangladesh-building-collapse.html?pagewanted=all>.

¹⁶ At the time of the Rana Plaza collapse, minimum wage for a worker was approximately \$37 a month. See Jim Yardley, *Export Powerhouse Feels Pangs of Labor Strife*, N.Y. TIMES, Aug. 23, 2012, http://www.nytimes.com/2012/08/24/world/asia/as-bangladesh-becomes-export-powerhouse-labor-strife-erupts.html?pagewanted=all&_r=0. In November 2013, in response to protests, it was raised to \$68 a month. However, a January 2014 survey by the Bangladesh Garment Manufacturers and Exporters Association found 38% of the 594 factories polled were still not paying the new minimum wage. See *Bangladesh Garment Factories Failing to Pay Minimum Wage*, THE EXPRESS TRIBUNE, Jan. 24, 2014, <http://tribune.com.pk/story/662841/bangladesh-garment-factories-failing-to-pay-minimum-wage/>.

¹⁷ Yardley, *Export Powerhouse Feels Pangs of Labor Strife*, *supra* note 16 (noting that in addition to factory owners being major political donors, ten percent of parliament's members are themselves owners).

¹⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

U.S. companies' liabilities as members of the Accord.¹⁹ Part VI will analyze and discuss the benefits of the Accord (primarily through contrasting it against the Alliance for Bangladesh Worker Safety, a competing retailer safety plan²⁰) weighed against the liabilities it imposes and its shortcomings. Part VII will conclude by urging the adoption of the Accord by retailers.

II. Problems within the Bangladesh Garment Industry

A. Tazreen Fashions Factory Fire

The Rana Plaza collapse was the deadliest event in the history of the Bangladesh garment industry, but it was not the first to draw attention to the country's working conditions. On November 24, 2012, a fire tore through the Tazreen Fashions factory, which filled a city block in an industrial suburb of Dhaka, Bangladesh.²¹ One hundred and twelve of the 1,400 workers in the factory died.²² Just a few months before the fire, the local fire department had refused to renew a certification required for the factory to operate, but no official made any effort to halt its operation.²³ Like the owner of Rana Plaza, the owner of Tazreen Fashions had received a permit

¹⁹ Though a few major U.S. retailers have signed onto the Accord, the majority of its signatories are European companies. Most notably, Gap and Wal-Mart have declined to join the Accord, arguing that its binding nature could result in liability in U.S. courts for another factory disaster. Proponents of the Accord argue the hesitant retailers are more concerned with avoiding the cost of factory repairs. Steven Greenhouse, *U.S. Retailers See Big Risk in Safety Plan for Factories in Bangladesh*, N.Y. TIMES, May 22, 2013, <http://www.nytimes.com/2013/05/23/business/legal-experts-debate-us-retailers-risks-of-signing-bangladesh-accord.html?pagewanted=all>.

²⁰ The Alliance was also formed in response to the Rana Plaza disaster by North American retailers who did not want to sign onto the Accord. It similarly calls for retailers to fund factory inspections, but has been criticized for not being legally binding and not requiring retailers to directly fund improvements. See Steven Greenhouse & Stephanie Clifford, *U.S. Retailers Offer Plan for Safety at Factories*, N.Y. TIMES, Jul. 10, 2013, <http://www.nytimes.com/2013/07/11/business/global/us-retailers-offer-safety-plan-for-bangladeshi-factories.html?pagewanted=all>.

²¹ Julhas Alam, *Dhaka Factory Lost Fire Certification*, ASSOCIATED PRESS, Dec. 7, 2012, <http://bigstory.ap.org/article/apnewsbreak-bangladesh-factory-lost-fire-safety-clearance-months-112-killed-blaze>.

²² *Id.*

²³ Options for government officials included levying fines, closing the factory, or ordering the destruction of illegally constructed floors. However, inspectors opted to allow the factory to continue operating without restriction while it ostensibly made safety upgrades. *Id.*

to build a smaller structure (here, three stories) and then illegally added an additional five floors; a ninth floor was in construction when the fire struck.²⁴ Despite its 1,400 workers, the building had no external fire escapes, no sprinkler system, and only three interior staircases.²⁵ The owner was also using the open-air ground floor as a warehouse for fabric and yarn—although the law required it be stored in a room with fireproof walls—which allowed the flames to spread quickly.²⁶ Even after fire alarms went off, some managers told workers to ignore them and continue working.²⁷ Managers went as far as to close gates to stop workers from leaving, and the factory lacked a mandatory television monitoring system.²⁸

The initial police investigation into the fire suggested saboteurs started it and found there was not enough evidence to charge the factory owner, Delowar Hossain.²⁹ However, under mounting social pressure, the Bangladesh High Court ordered a special government investigation.³⁰ After discovering the numerous safety abuses in the factory, the investigation said Hossain had committed “unpardonable negligence.”³¹ Despite these findings, charges were not filed at that time.³² Finally, in December 2013, Hossain, his wife Mahmuda Akther (who was a co-owner), the

²⁴ *Id.*

²⁵ Julfikar Ali Manik & Jim Yardley, *Bangladesh Finds Gross Negligence in Factory Fire*, N.Y. TIMES, Dec. 17, 2012, <http://www.nytimes.com/2012/12/18/world/asia/bangladesh-factory-fire-caused-by-gross-negligence.html>.

²⁶ *See id.*

²⁷ *Id.*

²⁸ Julfikar Ali Manik & Ellen Barry, *Months After Deadly Fire, Owners of Bangladesh Factory Surrender to Court*, N.Y. TIMES, Feb. 9, 2014, http://www.nytimes.com/2014/02/10/world/asia/owners-of-bangladesh-factory-surrender-in-deadly-fire.html?_r=0.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Despite the findings, many were skeptical that charges would ever be filed. While factory managers were occasionally charged, lawyers and activists have routinely faced obstacles in prosecuting owners for factory disasters. Proceedings are often delayed and reports go missing, which activists see as a stall tactic intended to frustrate them into giving up litigation and remove disasters from the public eye. *See* Jim Yardley, *Justice Still Elusive in Factory Disasters in Bangladesh*, N.Y. TIMES, June 29, 2013, <http://www.nytimes.com/2013/06/30/world/asia/justice-elusive-in-a-bangladesh-factory-disaster.html?pagewanted=all>.

factory manager, an engineer, and nine others were charged with culpable homicide.³³ Hossain and Akther did not surrender themselves until February 9, 2014.³⁴ Hossain intends to plead not guilty, maintaining that since he was not at the factory at the time of the fire, he was not involved.³⁵

The Tazreen factory, like most Bangladesh garment producers, made clothes for multiple retailers, including Wal-Mart.³⁶ In 2011, Wal-Mart internally audited the factory and labeled it “high-risk.”³⁷ A few months later, when a second audit showed no improvement in conditions, Wal-Mart stopped using the factory for production.³⁸ However, at the time of the fire, Wal-Mart brands were still being made in the factory because another Wal-Mart supplier had subcontracted with Tazreen without the company’s knowledge.³⁹

In response to this fire, the ILO brought together the Bangladesh Ministry of Labor and Employment, domestic unions, and factory owners to create the National Tripartite Plan of Action on Fire Safety for the Ready-Made Garment Sector in Bangladesh (Plan of Action).⁴⁰ The Plan of Action sought to identify unsafe factory conditions and propose legislative and practical solutions in order to rectify the conditions.⁴¹ However, the Plan of Action

³³ Manik & Berry, *supra* note 28.

³⁴ *Id.*

³⁵ *See id.*

³⁶ Alam, *supra* note 21.

³⁷ *Id.*

³⁸ *See id.*

³⁹ *Id.* Subcontracting has presented a significant barrier to self-regulation of Bangladesh factories. Companies committed to responsible production will often inspect the factories of their principle suppliers, but when these suppliers cannot meet demand, they send production to third parties that fall outside these inspections. *See* Andreas Wieland & Robert Handfield, *The Socially Responsible Supply Chain*, 17 SUPPLY CHAIN MGMT. REV. 22, 25 (2013).

⁴⁰ Press Release, International Labour Organization, Fire Safety - Tripartite Partners Adopt National Tripartite Plan of Action on Fire Safety for the Ready-Made Garment Sector in Bangladesh (Mar. 25, 2013), *available at* http://www.ilo.org/dhaka/Informationresources/Publicinformation/Pressreleases/WCMS_208172/lang--en/index.htm.

⁴¹ National Tripartite Plan of Action on Fire Safety for the Ready-Made Garment Sector in Bangladesh, Mar. 16 2013, *available at* http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilodhaka/documents/genericdocument/wcms_209285.pdf [hereinafter Plan of Action].

did not solicit support from the retailers being supplied by the factories.⁴²

B. The Rana Plaza Collapse

The Rana Plaza building was never meant to be a factory.⁴³ It was built with “‘extremely poor quality iron rods and cement’”⁴⁴ on unstable land that “‘had been a body of water before and was filled with rubbish.’”⁴⁵ The owner was given permission to build a six-story, non-industrial building but illegally added two floors to rent to garment factories.⁴⁶ In addition to the weight of the equipment and generators used by the factories, the vibrations of the machinery would shake the entire building.⁴⁷ However, due to the owner’s political connections (and alleged gang affiliations and bribery), the building was never threatened with closure.⁴⁸

On April 23, the day before the disaster, the shaking was so severe that cracks formed in the building’s walls, causing workers to flee.⁴⁹ An engineer was called to examine the building, and though he concluded that the building was extremely unsafe and should be closed immediately, the building’s owner claimed that it was only broken plaster.⁵⁰ The next morning, the factories were opened as usual.⁵¹ Some workers reported that when they were hesitant to enter, managers threatened to dock them an entire month’s pay.⁵² When the building collapsed, approximately 3,500

⁴² See *infra* Part IV (discussing additional details of the Plan of Action).

⁴³ See ASSOCIATED PRESS, *supra* note 2.

⁴⁴ *Id.* (quoting Khandker Mainuddin Ahmed, head of the government committee tasked with investigating the disaster).

⁴⁵ *Id.* (quoting Khandker Mainuddin Ahmed, head of the government committee tasked with investigating the disaster).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Jim Yardley, *The Most Hated Bangladeshi, Toppled From a Shady Empire*, N.Y. TIMES (Apr. 30, 2013), <http://www.nytimes.com/2013/05/01/world/asia/bangladesh-garment-industry-reliant-on-flimsy-oversight.html?pagewanted=all>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Jason Burke, *Bangladesh Factory Collapse Leaves Trail of Shattered Lives*, THE GUARDIAN (Jun. 6, 2013, 8:37 AM), <http://www.theguardian.com/world/2013/jun/06/bangladesh-factory-building-collapse-community>.

⁵² *Id.*

people were inside.⁵³ One survivor was trapped in the rubble for seventeen days, and the official recovery was stopped after twenty days.⁵⁴

The day after the collapse, Sohel Rana, the owner and builder of the plaza, was arrested after he was found hiding near the Indian border, hoping to flee the country.⁵⁵ In July, a government investigative committee issued a report finding widespread blame for the construction of Rana Plaza, and the mayor of Savar, whose office approved the building permit, was also arrested.⁵⁶ The committee called for all involved to be charged with culpable homicide—a charge that could result in a life sentence.⁵⁷ Charges were filed against Rana and seventeen others on July 16, 2014.⁵⁸ It is unlikely that Rana will escape such high profile charges, but some Bangladeshis are understandably worried that justice will not be served, due to Rana's political connections and past instances of Bangladeshi corruption.⁵⁹

C. A Continuing History of Unsafe Factories

The Rana Plaza collapse and Tazreen fire focused the world's attention on Bangladesh factory safety, and while those events have mobilized national and international organizations to improve safety in the garment industry, Bangladesh continues to be plagued by accidents. Less than a month after Rana Plaza, a fire destroyed the Tung Hai Sweater Factory in the Mirpur district of Dhaka, killing eight people.⁶⁰ The fire occurred at eleven o'clock after the

⁵³ Hisham Bin Mustafa, *Brief History of the Rana Plaza Tragedy*, PRIYO NEWS (May 14, 2013, 5:36 PM), <http://news.priyo.com/2013/05/14/end-savar-battle.html>.

⁵⁴ *Id.*

⁵⁵ Yardley, *The Most Hated Bangladeshi*, *supra* note 48.

⁵⁶ Rana was also required to get a permit from the Rajdhani Unnayan Kartipakkha (Rajuk), a national regulatory agency tasked with overseeing urban development. The mayor began issuing local permits because he felt Rajuk acted too slowly. Syed Zain Al-Mahmood, *Bangladesh Police Arrest Mayor of Town in Rana Plaza Garment Building Collapse*, WALL ST. J. (July 24, 2013, 4:50 PM), <http://online.wsj.com/news/articles/SB10001424127887324564704578626171088096096>.

⁵⁷ *Id.*

⁵⁸ *Bangladesh Charges 18 Over Garment Factory Collapse*, REUTERS (July 16, 2014, 5:37 PM), <http://in.reuters.com/article/2014/07/16/bangladesh-ranaplaza-idINL4N0PR33Q20140716>.

⁵⁹ See Yardley, *The Most Hated Bangladeshi*, *supra* note 48.

⁶⁰ Jim Yardley, *Fire at Bangladesh Factory Kills 8*, N.Y. TIMES (May 9, 2013), <http://www.nytimes.com/2013/05/10/world/asia/fire-at-bangladeshi-factory-kills-8.html>.

workers left, limiting the death toll, but struck while upper level management was holding a meeting with local police officials.⁶¹ The police deputy inspector general and the factory's managing director (who was also a director of the Bangladesh Garment Manufacturers and Exporters Association, an important trade group) were killed.⁶² At that time, the factory was undergoing repairs to its electrical systems but had not been closed.⁶³ An investigation into the fire indicated that it started when sparks from a short-circuit fell onto piles of yarn stored in the open, and the smoke and fumes poisoned and suffocated those inside.⁶⁴ The factory's 1,800 workers had left less than an hour before the fire started.⁶⁵

On October 8, 2013, another fire hit in the Aswad Composite Mills factory, killing ten and injuring dozens.⁶⁶ Like the Tung Hai factory, Aswad was closed when the fire started, but unfortunately 200 workers were still in the building, working overtime.⁶⁷ While the loss of life was thankfully comparatively small compared to Rana Plaza or Tazreen, the Aswad fire frustrated activists, because it demonstrated how little had changed since those disasters.⁶⁸ An investigation into the fire did not establish a cause, but determined that the fire started on the first floor, trapping workers inside.⁶⁹ The factory was producing clothes for several Western retailers, including Loblaw, the parent company to several Canadian clothing brands.⁷⁰ Loblaw, however, stated it had stopped ordering from this factory in April 2013, leading it to believe one of its

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Mohosinul Karim, 'Toxic Fumes' Were Behind Tung Hai Factory Deaths, DHAKA TRIB. (May 29, 2013), <https://www.dhakatribune.com/bangladesh/2013/may/29/'toxic-fumes'-were-behind-tung-hai-factory-deaths>.

⁶⁵ *Id.*

⁶⁶ Syed Zain Al-Mahmood, *Deadly Fire Hits Bangladesh Factory*, WALL ST. J. (Oct. 8, 2013), <http://online.wsj.com/news/articles/SB10001424052702304171804579123704212316452>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* Bangladesh factories, including Tazreen and Tung Hai, frequently store yarn and fabric on lower floors in extremely unsafe manners. See *supra* Part II(A)-(B).

⁷⁰ Al-Mahmood, *supra* note 66.

other suppliers had subcontracted with Aswad.⁷¹ Aswad had been on the Accord's list of factories marked for future inspection, underscoring the importance of beginning inspections as soon as possible.⁷² The Aswad factory was owned by the Palmal Group, a large Bangladeshi conglomerate that runs twenty-seven other factories.⁷³

III. Accord on Fire and Building Safety in Bangladesh

Retailers responded quickly to the Rana Plaza disaster. On May 13, 2013, just three weeks after the collapse, the largest purchasers of Bangladeshi garments announced the creation and signing of the Accord.⁷⁴ The Accord was the result of collaboration between the retailers supplied by Bangladeshi factories and workers' unions, with input from NGOs concerned with improving international labor standards.⁷⁵ Currently, the Accord has over 170 retailer signatories and ten union members (the massive international unions IndustriALL Global Union,⁷⁶ UNI Global Union⁷⁷, and eight Bangladeshi garment unions).⁷⁸

⁷¹ *Id.*

⁷² *Id.* Parties to the Accord, having recently finalized its inspection standards, have started inspecting a small pilot group of factories. *See also* Press Release, Accord on Fire and Building Safety in Bangladesh, Bangladesh Accord Reaches 150 Signatory Mark (Feb. 12, 2014), *available at* <http://www.bangladeshaccord.org/2014/02/bangladesh-accord-150-signatories/> (noting that factory inspections had begun).

⁷³ Al-Mahmood, *supra* note 66.

⁷⁴ Steven Greenhouse & Jim Yardley, *Major Retailers Join Bangladesh Safety Plan*, N.Y. TIMES (May 13, 2013), <http://www.nytimes.com/2013/05/14/world/asia/bangladeshs-cabinet-approves-changes-to-labor-laws.html?pagewanted=all>.

⁷⁵ *Id.*

⁷⁶ IndustriALL represents 50 million workers in 140 countries across a variety of industries. *About Us*, INDUSTRIALL GLOBAL UNION, <http://www.industriall-union.org/about-us> (last visited Sept. 23, 2014).

⁷⁷ UNI represents "20 million workers from over 900 trade unions" across a variety of industries. *About Us*, UNI GLOBAL UNION, <http://www.uniglobalunion.org/about-us> (last visited Sept. 23, 2014).

⁷⁸ *Signatories*, ACCORD ON FIRE & BUILDING SAFETY BANGLADESH, <http://www.bangladeshaccord.org/signatories/> (last visited Sept. 23, 2014). The largest of the signing retailers are European companies, most notably the British companies Primark and Tesco and "the Swedish retail giant H&M"—the single largest purchaser of Bangladeshi garments. Greenhouse & Yardley, *supra* note 74. The most prominent American retailer at the time of signing was "PVH, the parent company of Calvin Klein, Tommy Hilfiger, and Izod." *Id.* Since its announcement, a few more American retailers, such as Fruit of the Loom, Abercrombie & Fitch, and American Eagle Outfitters, have

These retailers source from approximately 1,600 different factories across Bangladesh.⁷⁹ The Accord's goal is "a safe and sustainable Bangladeshi Ready-Made Garment ("RMG") industry in which no worker needs to fear fires, building collapses, or other accidents."⁸⁰ The Accord's terms are legally binding on the signatories for five years.⁸¹

To oversee its mission, the Accord sets up a steering committee (the "SC") composed of equal members chosen by the retailers and the unions.⁸² The ILO also chooses a member to act as a "neutral chair" of the SC.⁸³ This committee is tasked with developing and implementing the standards of the Accord in collaboration with the Bangladesh Ministry of Labor and Employment and a comparable committee set up by the Plan of Action.⁸⁴ In order to create a unified approach with respect to inspections and safety standards, the terms of the Accord require frequent consultation with the Plan of Action Committee and, if possible, a "shared advisory structure."⁸⁵ The SC is also responsible for selecting and reviewing the main officers of the Accord: the Safety Inspector and the Training Coordinator.⁸⁶ The SC's final obligation is dispute resolution. Should a dispute arise between members of the Accord, it will be presented to and decided by the SC.⁸⁷ Any party that is not satisfied with the SC's decision can appeal, which will result in a "final and binding arbitration process."⁸⁸

The provision for binding arbitration is what gives the Accord its legal heft and separates it from previous agreements on internally improving industry safety. Under the Accord,

also joined the Accord. *Id.*

⁷⁹ *Accord Public Disclosure Report 1 Sept. 2014*, ACCORD ON FIRE & BUILDING SAFETY BANGLADESH (Sept. 1, 2014), <http://bangladeshaccord.org/wp-content/uploads/Accord-Public-Disclosure-Report-1-September-2014.pdf>.

⁸⁰ Accord, *supra* note 7, at Preamble.

⁸¹ *FAQs*, *supra* note 8.

⁸² Accord, *supra* note 7, at para. 4.

⁸³ *Id.*

⁸⁴ *Id.* at para. 7.

⁸⁵ *Id.* at para. 6.

⁸⁶ *Id.* at para. 4.

⁸⁷ *Id.* at para. 5.

⁸⁸ Accord, *supra* note 7, at para. 5.

arbitration awards are subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁸⁹ (the New York Convention). The New York Convention obligates signing nations⁹⁰ to recognize a written agreement “under which the parties undertake to submit to arbitration.”⁹¹ If there are any arbitral awards ordered, arising under such an agreement, a participating country “shall recognize [them] as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.”⁹² Therefore, the local courts of each member of the Accord have the authority and jurisdiction to enforce an award made against a company that may break its obligations.

The Accord divides participating retailers’ suppliers into three categories.⁹³ Tier 1 factories are those that make 30% or more of a company’s total, annual production in Bangladesh.⁹⁴ These factories are required to have safety inspections, fire safety training, and supply remediation to displaced workers.⁹⁵ Factories that do not qualify as Tier 1, but are still “major or long-term suppliers” are classified as Tier 2 factories.⁹⁶ At least 65% of a member’s production must come from Tier 1 and Tier 2 factories.⁹⁷ Tier 2 factories receive inspections and are obligated to provide remediation, but they do not have to receive training.⁹⁸ Factories producing less than 10% of a company’s garments are Tier 3.⁹⁹ No more than 35% of a member’s total production can

⁸⁹ *Id.*

⁹⁰ Bangladesh, the United States, and all the countries of Europe are among the 149 countries that have signed the New York Convention. *List of Contracting States*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> (last visited Sept. 23, 2014).

⁹¹ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3, art. II [hereinafter *The New York Convention*].

⁹² *Id.* at art. III.

⁹³ Accord, *supra* note 7, at paras. 1–3.

⁹⁴ *Id.* at para. 1.

⁹⁵ *Id.*

⁹⁶ *Id.* at para. 2.

⁹⁷ *Id.*

⁹⁸ *Id.* at para. 2.

⁹⁹ Accord, *supra* note 7, at para. 3.

come from Tier 3 factories.¹⁰⁰ These factories are only subject to “limited initial inspections,” but if a facility is determined to be high risk, it will be treated as if it were a Tier 2 factory, regardless of its production percentage.¹⁰¹ Any supplier, even if subcontracted by another without the knowledge of the retailer, is intended to be covered by Accord’s inspection standards.¹⁰²

The Chief Safety Inspector¹⁰³ is tasked with overseeing and coordinating the factory inspections.¹⁰⁴ He will determine the safety standards required in collaboration with the Plan of Action committee and select personnel to perform inspections.¹⁰⁵ The Accord allows companies to continue inspecting their own factories if they so choose, but their processes and standards must be approved by the Chief Safety Inspector, and they must provide

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Press Release, ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *Statement on Unauthorized Subcontracting to Accord Signatories in Dutch Media* (Jan. 25, 2014), <http://www.bangladeshaccord.org/2014/01/statement-unauthorised-subcontracting-accord-signatories-dutch-media/> (“Unauthorized sub-contracting is one of the many recognised challenges for the Accord and it is impossible for the Accord alone to end the practice of unauthorised subcontracting. Where factories of unauthorised subcontractors are identified and confirmed as supplying an Accord signatory, they will be subject to the same process of inspection as primary suppliers. Our inspectors will inspect and support remediation of safety issues at such locations where necessary.”).

¹⁰³ On October 17, 2013, the Accord announced the SC had chosen Brad Loewen as the Chief Safety Inspector. Loewen was previously Administrator of Commercial Plan Examination and Inspections for the city of Winnipeg, Canada, and has experience in “fire safety, workplace safety and health, mediation and conciliation, and engineering.” Press Release, ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *Bangladesh Accord Appoints Its Leadership Team* (Oct. 17, 2013), <http://www.bangladeshaccord.org/2013/10/bangladesh-accord-appoints-leadership-team/#more-368>.

¹⁰⁴ Accord, *supra* note 7, at para. 8.

¹⁰⁵ *Id.* at para. 9. On January 14, 2014, the Accord published their finalized building standards. The standards are the result of collaboration between the Accord’s Safety Inspector, the National Tripartite Plan of Action, the Alliance, and the ILO. Press Release, ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *Accord Announcement of Factory Safety Inspection Standards* (Jan. 14, 2014), <http://www.bangladeshaccord.org/2014/01/factory-safety-inspection-standards/>. The seventy-four page document is intended to be as comprehensive as possible and addresses appropriate building materials, construction practices, necessary safety features for factories, procedures for adding onto buildings, and “human element programs,” such as fire drills and evacuation routes. See The Accord on Fire and Building Safety in Bangladesh, Building Standard, Dec. 30, 2013, available at <http://www.bangladeshaccord.org/wp-content/uploads/Accord-building-standard.pdf>.

access to all findings.¹⁰⁶ The goal of the Accord is to inspect all member factories within two years.¹⁰⁷ If the Chief Safety Inspector determines that a factory poses an immediate danger, he notifies the factory's management, local union officials (if any), the Chief Safety Inspector, and the union members of the Accord.¹⁰⁸ When a factory is deemed dangerous, the companies it supplies require the factory to make repairs.¹⁰⁹

Tier 1 factories are required to train workers in addition to receiving inspections.¹¹⁰ The Training Coordinator appointed by the Safety Inspector, will provide any qualifying factory with programs on basic safety measures and precautions to ensure management and workers know what to do during a fire or other disaster.¹¹¹ The programs are meant not only to encourage safe practices but also to ensure that workers have an opportunity to raise any specific concerns that they may have.¹¹² To that end, the Accord also requires all factories (regardless of tier) to create a Health and Safety Committee to discuss factory concerns.¹¹³ At least half of the members of these committees must be workers.¹¹⁴ These committees also work with safety inspectors to ensure that workers know if a factory is a severe danger.¹¹⁵

The Accord takes several other steps to increase workers' rights. In addition to the Health and Safety Committees that give workers a voice, it requires members to end relationships with suppliers that do not provide compensatory wages for up to six months when a factory closes for repairs.¹¹⁶ Companies are also required to make reasonable efforts to find workers new employment if they are fired as a result of cutbacks in orders to a

¹⁰⁶ Accord, *supra* note 7, at para. 10.

¹⁰⁷ *Id.* at para. 9.

¹⁰⁸ *Id.* at para. 11.

¹⁰⁹ *Id.* at para. 12.

¹¹⁰ *Id.* at para. 16.

¹¹¹ *Id.* The government committee investigating the Tazreen Fashions fire found several preparedness issues that increased the death toll, such as an improper escape plan and lack of training on how to use fire extinguishers. See Manik & Yardley, *supra* note 25.

¹¹² Accord, *supra* note 7, at para. 16.

¹¹³ *Id.* at para. 17.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at para. 11.

¹¹⁶ *Id.* at para. 13.

particular factory.¹¹⁷ Workers who refuse to work based on a reasonable fear for safety cannot be discriminated against, forced to work, docked pay, or fired.¹¹⁸

The administrative costs of the Accord are provided by the signatory companies.¹¹⁹ Each company provides funding based on its percentage of garment production in Bangladesh with a maximum contribution of \$500,000.¹²⁰ This money goes towards the cost of facilities and operations for the SC, factory inspections, and training programs.¹²¹ The money for factory upgrades comes primarily through economic incentives. First, companies are required to terminate business with any factory that does not agree to participate in the measures required by the Accord.¹²² For factories that accept the repairs, the cost is to come primarily from renegotiating contracts to give more favorable terms to suppliers.¹²³ Such terms should “ensure that it is financially feasible” for factories to create safe work environments.¹²⁴ Furthermore, companies cannot abandon factories for negligible price increases, as the Accord requires them to continue purchasing at the same or greater volume for the first two years of participation, provided it is “commercially viable.”¹²⁵ To supplement these arrangements, companies are also encouraged to directly invest in factories, give loans, pay for repairs, or solicit donations from NGOs and other governments.¹²⁶ Regardless of the method, member retailers are required to ensure that funds are available for a supplier trying to make repairs.¹²⁷ The SC is responsible for ensuring that all funds are accounted for and used responsibly.¹²⁸

¹¹⁷ *Id.* at para. 14.

¹¹⁸ Accord, *supra* note 7, at para. 15.

¹¹⁹ *Id.* at para. 24.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at para. 21.

¹²³ *Id.* at para. 22.

¹²⁴ See Accord, *supra* note 7, at para. 22.

¹²⁵ *Id.* at para. 23.

¹²⁶ *Id.* at para. 22.

¹²⁷ See *id.*

¹²⁸ See *id.* at para. 25.

IV. National Tripartite Plan of Action on Fire Safety [and Structural Integrity] in the Ready-Made Garment Sector in Bangladesh

As discussed in Part III, the Accord is closely tied to the Plan of Action that preceded it. The original Plan of Action was formally adopted on March 24, 2013, in response to the fire at Tazreen Fashions.¹²⁹ It was facilitated by the ILO¹³⁰ and signed by the Bangladesh Ministry of Labor and Employment (MoLE) and the garment industry's leading trade associations, including the very influential Bangladesh Garment Manufacturers and Exporters Association (BGMEA).¹³¹ Unlike the Accord, the Plan of Action is an agreement only between Bangladeshi entities and does not include retailers.¹³² In its broadest terms, the goal is to improve worker safety through three paths: legislative, administrative, and practical.¹³³ In order to facilitate the implementation of the plan, Bangladesh formed the High-Level Tripartite Committee (High Committee),¹³⁴ which is made up of a representative from each signatory and relevant cabinet members,¹³⁵ chaired by the Secretary of the MoLE.¹³⁶ On July 25, the High Committee amended the Plan of Action slightly in response to the Rana Plaza collapse, renaming it the National Tripartite Plan of Action on Fire Safety and Structural Integrity in the Ready-Made Garment Sector in Bangladesh¹³⁷ (Integrated Plan of Action) but substantively

¹²⁹ See Press Release, International Labour Organization, *supra* note 40.

¹³⁰ See Plan of Action, *supra* note 41, at 2.

¹³¹ See *id.* at 12.

¹³² See *id.* at 2.

¹³³ See *id.* at 2–3.

¹³⁴ See *id.* at 3.

¹³⁵ Members are as follows: Director of the Department Labour, Deputy Secretary of the MoLE, Chief Inspector of the Department of Inspection for Factories and Establishments, head of RAJUK, Director General of the Bangladesh Fire Service and Civil Defense, President of the Bangladesh Employers Federation, President of the BGMEA, President of the Bangladesh Knitwear Manufacturers and Exporters' Association, head of the National Coordination Committee for Worker's Education, and head of the Bangladesh National Council. *Id.* at 15.

¹³⁶ See Plan of Action, *supra* note 41, at 3.

¹³⁷ National Tripartite Plan of Action on Fire Safety and Structural Integrity in the Ready-Made Garment Sector in Bangladesh, Jul. 25, 2013, *available at* http://www.ilo.org/dhaka/Informationresources/WCMS_221543/lang-en/index.htm [hereinafter Integrated Plan of Action].

keeping the same plan as the March agreement.¹³⁸

The MoLE is assigned the majority of duties under the Integrated Plan of Action.¹³⁹ Under the legislative prong of the plan, it is tasked with submitting a labor law reform package to Parliament, drafting a National Occupational Safety and Health Policy (with input from the ILO), reviewing and updating current safety and building laws, and creating a specialized task force on building and fire safety as part of the Cabinet Committee for the Ready-Made Garment Sector.¹⁴⁰ The MoLE is also responsible for implementing an overhaul of the administrative agencies that monitor Bangladesh's garment industry.¹⁴¹ Its first step is filling vacancies and adding an additional 200 inspectors, with the ultimate goal of having at least 800 inspectors in the Department of Inspection for Factories and Establishments.¹⁴² Bangladesh has allocated three million dollars to help meet these goals.¹⁴³ The MoLE also wants to update the way it trains inspectors and secures funding for new equipment and infrastructure for inspectors and local firefighters.¹⁴⁴ Finally, the MoLE hopes to unify government agencies currently responsible for permits and licensing to eliminate overlap and close gaps (like the local license issued for Rana Plaza in lieu of national building permit).¹⁴⁵

The BGMEA and the other groups representing manufacturers are required to begin practical self-policing to supplement the

¹³⁸ Press Release, International Labour Organization, *Government, Employers and Workers Organizations Sign Integrated National Action Plan on Fire Safety and Structural Integrity in the Garment Sector* (Jul. 25, 2013), available at http://www.ilo.org/dhaka/Informationresources/Publicinformation/Pressreleases/WCMS_218230/lang--en/index.htm. Under the Integrated Plan of Action, the secretary general of IndustriALL Bangladesh Council replaced the head of the Bangladesh National Council on the High Committee. See Integrated Plan of Action, *supra* note 137, at 16.

¹³⁹ See Integrated Plan of Action, *supra* note 137, at 5–8.

¹⁴⁰ See *id.* at 5–6.

¹⁴¹ See *id.* at 6–8.

¹⁴² *Id.* at 6–7. The Department is already well on their way to meeting their goal. On January 15, 2014, they sanctioned 679 new positions, including 392 new inspectors, which would increase the total from 183 to 575 inspectors. Press Release, International Labour Organization, *ILO Welcomes the Upgrading of the Bangladesh Labour Inspectorate* (Feb. 9, 2014), http://www.ilo.org/dhaka/Informationresources/Publicinformation/Pressreleases/WCMS_235289/lang--en/index.htm.

¹⁴³ Integrated Plan of Action, *supra* note 137, at 7.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 7–8.

MoLE's obligations. The BGMEA is tasked with developing a scale on which a factory's need for improvement can be judged, creating a system to increase transparency and accountability for suppliers that sub-contract to other factories, requiring all mid-level managers of its members to attend a fire-safety course, and rehabilitating and reemploying the disabled and out-of-work victims of Rana Plaza.¹⁴⁶ The Integrated Plan of Action gives the High Committee the lead in developing a national system for improving safety based on the BGMEA's findings on need assessment but also specifically acknowledges and welcomes input from the Accord.¹⁴⁷ The plan aims to complete government inspections of all garment factories by December 2014.¹⁴⁸

The ILO has worked closely with Bangladesh to implement and encourage the Integrated Plan of Action. The High Committee has tasked the Bangladesh University of Engineering and Technology with inspecting any factory not covered by the Accord or the Alliance.¹⁴⁹ Inspections started on November 22, 2013.¹⁵⁰ Inspectors will follow a criteria developed in collaboration with the ILO, the Accord, and the Alliance to ensure a uniform standard is applied to all factory inspections.¹⁵¹ To help achieve these goals, the Government of Bangladesh and the ILO has pledged \$24.21 million over three and a half years for the "Improving Working Conditions in the Ready-Made Garment Sector" initiative.¹⁵² According to Gilbert Fossoun Hounbo (ILO Deputy-Director General for Field Operations and Partnerships), "This programme will provide support in implementing the National Tripartite Plan of Action on fire safety and structural integrity. Successful implementation of the programme will

¹⁴⁶ *Id.* at 8–14.

¹⁴⁷ *See id.* at 9.

¹⁴⁸ *Id.*

¹⁴⁹ Press Release, International Labour Organization, RMG Building Safety Inspections to Start Tomorrow After Major Breakthrough (Nov. 21, 2013), http://www.ilo.org/dhaka/Informationresources/Publicinformation/Pressreleases/WCMS_230293/lang--en/index.htm.

¹⁵⁰ *Id.*

¹⁵¹ *See id.*

¹⁵² Press Release, International Labour Organization, Major ILO Programme Aims to Make Bangladesh Garment Industry Safer (Oct. 22, 2013), http://www.ilo.org/dhaka/Informationresources/Publicinformation/Pressreleases/WCMS_226720/lang--en/index.htm.

ensure better working conditions and safety for the ready-made garment workers in Bangladesh.”¹⁵³ The United Kingdom and the Netherlands have already contributed \$15 million to the program, and the ILO is currently seeking additional funds.¹⁵⁴

V. *Kiobel v. Royal Dutch Petroleum Co.* and U.S. Corporate Liability.

Multiple U.S. companies have cited liability concerns as their reason for not joining the Accord,¹⁵⁵ but recent developments in domestic law, primarily the holding in *Kiobel v. Royal Dutch Petroleum Co.*, should mitigate these objections.¹⁵⁶ The issue presented in *Kiobel* was “whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States.”¹⁵⁷ Petitioners were Nigerian nationals who had moved to the U.S. after being granted political asylum.¹⁵⁸ They were formerly residents of Ogoniland, the name given to a 250 square mile area in the Niger Delta.¹⁵⁹ During the early 1990s, residents of Ogoniland were viciously persecuted by the Nigerian military, which would attack Ogoni villages by “beating, raping, killing, and arresting residents and destroying or looting property.”¹⁶⁰ Petitioners alleged that the persecution was at the behest of Shell Petroleum Development Company (“SPDC”)¹⁶¹ because the inhabitants of Ogoniland had been protesting the effects of the company’s oil exploration and production practices.¹⁶² Petitioners also claimed that the respondents gave aid to the military forces and allowed them to stage attacks on their land.¹⁶³ They filed suit

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See Greenhouse, *supra* note 19.

¹⁵⁶ *Kiobel*, 133 S. Ct. at 1668-70.

¹⁵⁷ *Id.* at 1662.

¹⁵⁸ *Id.* at 1663.

¹⁵⁹ *Id.* at 1662.

¹⁶⁰ *Id.*

¹⁶¹ SPDC was a subsidiary of the holding companies Royal Dutch Petroleum Company and Shell Transport and Trading Company, against whom the Ogoni filed suit. *Id.*

¹⁶² *Id.*

¹⁶³ *Kiobel*, 133 S. Ct. at 1663.

under the Alien Tort Statute (ATS),¹⁶⁴ on the theory that the oil companies had broken the law of nations by aiding and abetting human rights violations.¹⁶⁵

The Court affirmed the lower court's dismissal¹⁶⁶ of the Nigerian nationals' complaint, but for different reasons.¹⁶⁷ The Court's holding centered "on a canon of statutory interpretation known as the presumption against extraterritorial application," which stands for the idea that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."¹⁶⁸ This presumption is made to prevent conflicts between the laws of the United States and laws of other nations and to prevent courts from accidentally interfering in foreign policy when interpreting legislation.¹⁶⁹ In cases involving the ATS (and even more so when such an action "reaches conduct within the territory of another sovereign"), the possibility of negatively impacting foreign policy is high, so courts should be wary about expanding the statute.¹⁷⁰ Given these concerns, the Court held that "the presumption against extraterritoriality thus constrain courts exercising their power under the ATS."¹⁷¹ Looking at the text and history¹⁷² of the statute, the Court found "no support for the proposition that Congress expected causes of action to be brought under the statute for

¹⁶⁴ "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350.

¹⁶⁵ See *Kiobel*, 133 S. Ct. at 1663.

¹⁶⁶ The Second Circuit Court of Appeals rejected the claim on the theory that since corporations had never "been subject to *any* form of liability under the customary international law of human rights, . . . the ATS . . . simply does not confer jurisdiction over suits against corporations." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 121 (2d. Cir. 2010).

¹⁶⁷ *Kiobel*, 133 S. Ct. at 1664.

¹⁶⁸ *Id.* (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (internal quotation marks omitted)).

¹⁶⁹ See *id.*

¹⁷⁰ See *id.* at 1664–65.

¹⁷¹ *Id.* at 1665.

¹⁷² The Court noted that historically only three crimes violated the law of nations: "violation of safe conducts, infringement of the rights of ambassadors, and piracy," all which could, by definition, only occur within the country or at sea, outside any jurisdiction. See *id.* at 1666–67. The statute was created to "provide judicial relief to foreign officials injured in the United States," not to create "a uniquely hospitable forum for the enforcement of international norms." *Kiobel*, 133 S. Ct. at 1668.

violations of the law of nations occurring abroad,”¹⁷³ so therefore the “presumption against extraterritoriality applies to claims under the ATS.”¹⁷⁴

The Court offers one narrow way to rebut the presumption against extraterritorial application: courts may be allowed to hear cases on actions occurring outside the United States, under the ATS, when the claims “touch and concern the territory of the United States” with “sufficient force.”¹⁷⁵ “[M]ere corporate presence,” however, is not sufficient to overcome the presumption.¹⁷⁶ In the wake of *Kiobel*, few courts have found that an extraterritorial tort has sufficiently touched and concerned the territory of the United States, but there are two recent cases that stand out.

The first was *Mwani v. Laden*.¹⁷⁷ There, the court allowed Kenyan nationals to move forward with a suit against Osama Bin Laden¹⁷⁸ and al-Qaeda for deaths resulting from the 1998 embassy bombings in Kenya, arguing that the attack fit the scenario outlined at the end of *Kiobel*.¹⁷⁹ Differentiating it from the facts of *Kiobel*, the court noted that part of the attack was planned in the United States, and even though the plaintiffs were suing over collateral deaths of Kenyan citizens, the overall attack was directed against a U.S. embassy and its citizens.¹⁸⁰

The second prominent case finding that a matter touched and concerned the United States is *Sexual Minorities Uganda v. Lively*,¹⁸¹ in which an organization representing lesbian, gay, bisexual, transgender, and intersex people in Uganda sought to

¹⁷³ *Kiobel*, 133 S. Ct. at 1667.

¹⁷⁴ *Id.* at 1669.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Mwani v. Laden*, 947 F. Supp. 2d 1 (D.D.C. 2013).

¹⁷⁸ Despite the notable issue of being dead, Bin Laden remained a defendant because the case had been stayed (pending the verdict of *Kiobel*) before his assassination. *See id.* at 1–2.

¹⁷⁹ *See id.* at 5 (“It is obvious that a case involving an attack on the United States Embassy in Nairobi is tied much more closely to our national interests than a case whose only tie to our nation is a corporate presence here. Ample evidence has been presented for me to conclude that the events at issue in this case were directed at the United States government, with the intention of harming this country and its citizens.”).

¹⁸⁰ *See id.*

¹⁸¹ *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013).

bring suit against Scott Lively, a U.S. citizen, for crimes against humanity because of his role in encouraging the repression of LGBTI rights and assistance in developing laws to persecute LGBTI people.¹⁸² Lively filed a motion to dismiss on several grounds, one of which was that *Kiobel* should prevent the suit, as the harms occurred outside the United States.¹⁸³ The court bluntly rejected this argument, distinguishing *Kiobel* by pointing out that Lively was a U.S. citizen,¹⁸⁴ and that while the persecution may have occurred abroad, the majority of Lively's offensive conduct happened in the United States.¹⁸⁵ The court found his actions somewhat similar to the facts of *Mwani*, stating "[d]efendant's alleged actions in planning and managing a campaign of repression in Uganda from the United States are analogous to a terrorist designing and manufacturing a bomb in this country, which he then mails to Uganda with the intent that it explode there."¹⁸⁶ The court did not think *Kiobel*'s restrictions should apply "where a defendant *and* his or her conduct are based in this country."¹⁸⁷

Although courts are still in the process of fully defining *Kiobel*, cases in which sufficient action touches and concerns the United States are the exception, not the rule; the majority of ATS claims after *Kiobel* have been dismissed when the events occurred abroad, even if there is an American defendant.¹⁸⁸ The United

¹⁸² See *id.* at 310 ("Indeed, Defendant, according to the Amended Complaint, is alleged to have maintained what amounts to a kind of 'Homophobia Central' in Springfield, Massachusetts. He has allegedly supported and actively participated in worldwide initiatives, with a substantial focus on Uganda, aimed at repressing free expression by LGBTI groups, destroying the organizations that support them, intimidating LGBTI individuals, and even criminalizing the very status of being lesbian or gay.").

¹⁸³ See *id.*

¹⁸⁴ See *id.* at 322 ("This is not a case where a foreign national is being hailed into an unfamiliar court to defend himself. Defendant is an American citizen located in the same city as this court. The presumption against extraterritoriality is based, in large part, on foreign policy concerns that tend to arise when domestic statutes are applied to foreign nationals engaging in conduct in foreign countries.").

¹⁸⁵ See *id.* at 321–22.

¹⁸⁶ *Id.* at 322.

¹⁸⁷ *Lively*, 960 F. Supp. 2d at 311 (emphasis added).

¹⁸⁸ See Roger Alford, *Lower Courts Narrowly Interpret Kiobel*, OPINIO JURIS (Sept. 23, 2013), <http://opiniojuris.org/2013/09/23/lower-courts-narrowly-interpret-kiobel/> ("It is still too early to reach any serious conclusions about *Kiobel*'s progeny. But the early

States Court of Appeals for the Second Circuit has stated unequivocally that *Kiobel* bars any claim that has “failed to allege that any relevant conduct occurred in the United States.”¹⁸⁹ In *Balintulo v. Daimler AG*, the court held victims of apartheid could not bring suit against American corporations that did business with the South African government, which the plaintiffs argued facilitated the government’s many human rights abuses.¹⁹⁰ The court rejected the idea that *Kiobel* created a multi-factor test and held that a claim could not be raised under the ATS for “violations of the law of nations occurring within the territory of a sovereign other than the United States Accordingly, if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*.”¹⁹¹ More cases will need to be heard to fully clarify the “narrow category”¹⁹² of situations in which *Kiobel*’s exception applies, but for now the consensus is that “it [is] more difficult for human rights activists to sue United States corporations for human rights violations overseas.”¹⁹³

VI. Analysis and Impact

The Accord is a novel approach to the all too common problem of unacceptable labor conditions—a problem that is especially pervasive in Bangladesh, as there was never a time in the country’s history when it could institute modern industrialization or develop strong unions.¹⁹⁴ In the chaotic times following the end of

scorecard does not look promising for plaintiffs.”).

¹⁸⁹ *Balintulo v. Daimler AG*, 727 F.3d 174, 189 (2d Cir. 2013) (“The Plaintiffs’ argument, however, seeks to evade the bright-line clarity of the Court’s actual holding.”).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 189–90.

¹⁹² *Mwani v. Laden*, 947 F. Supp. 2d 1, 5 (D.D.C 2013).

¹⁹³ Alison Bensimon, *Corporate Liability Under the Alien Tort Statute: Can Corporations Have Their Cake and Eat It Too?*, 10 LOY. U. CHI. INT’L L. REV. 199, 218 (2013). But see *Kiobel*, 133 S.Ct. at 1669 (Kennedy, J., concurring) (arguing that “the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute,” although future human rights abuses likely will be (and should be) addressed by more specific Congressional statutes such as the Torture Victim Protection Act of 1991); see Matteo M. Winkler, *What Remains of the Alien Tort Statute After Kiobel?*, 39 N.C. J. INT’L L. & COM. REG. 173, 186–89 (2013) (arguing that while *Kiobel* does present a barrier to transnational human rights litigation and will require further case law, it is still open to a narrow interpretation which could bar only “F-cubed action” (foreign defendant, foreign plaintiff, foreign events)).

¹⁹⁴ See Zia Rahman & Tom Langford, *Why Labour Unions Have Failed*

colonialism, the country oscillated between military dictators that would strictly prohibit unions and socialist regimes that would exploit unions for political purposes.¹⁹⁵ When globalization came to Bangladesh in the 1980s, it was a “race-to-the-bottom.”¹⁹⁶ The country was controlled by a small group of ruling elites who exploited their status and played up the perception of unions as corrupt in order to attract garment manufacturers with some of the lowest wages in the world and a large supply of available workers.¹⁹⁷ As the garment industry grew to dominate Bangladesh’s economy, both factory owners and politicians resisted changes that would threaten their profits, resulting in negligent oversight and disasters like Tazreen Fashions and Rana Plaza.¹⁹⁸

It is unfortunate that the situation had to deteriorate so far in order for reforms to occur, but the co-occurrence of the Accord and the Integrated Plan of Action present a unique opportunity for improving safety standards and workers’ rights. The concurrent implementation of the Accord and the Integrated Plan of Action combines the money of retailers with the legislative power of the government, providing each group with a tool not previously at their disposal. The Accord represents a new model of accountability because it holds retailers, the biggest beneficiaries of the Bangladesh supply chain, jointly responsible for the conditions of the actual manufacturers.¹⁹⁹ Although novel to the current, international market for goods, the Accord uses principles that were effective in eliminating sweatshop conditions in the American garment industry in the mid twentieth century.²⁰⁰ Encouraging collective bargaining between workers, contractors, and lead firms promotes better labor conditions, fair prices, and a stable supply chain, and divides the costs of these improvements

Bangladesh’s Garment Workers, in *LABOUR IN THE GLOBAL SOUTH: CHALLENGES AND ALTERNATIVES FOR WORKERS* 87, 89 (Sarah Mosoetsa & Michelle Williams eds., 2012).

¹⁹⁵ See *id.* at 91–5.

¹⁹⁶ *Id.* at 87.

¹⁹⁷ See *id.*

¹⁹⁸ See *id.* at 89–91.

¹⁹⁹ Mark Anner, Jennifer Bair & Jeremy Blasi, *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations*, 35 *COMP. LAB. L. & POL’Y J.* 1, 2 (2013).

²⁰⁰ See *id.*

amongst all concerned parties.²⁰¹

The cost of making the Bangladesh garment industry safe has long been a barrier to change.²⁰² Apart from simply losing profits, government officials have also been hesitant to make changes and risk losing millions of jobs, since the global nature of the garment industry allows retailers to easily move to suppliers in other countries with weaker regulations.²⁰³ By some estimates, the cost of implementing the goals of the Accord and the Integrated Plan of Action could average \$500,000 per factory, making the total cost of the programs around \$1 billion.²⁰⁴ This number seems daunting if applied to only a section of the industry, or for the Bangladeshi government alone, but union representatives calculate that the cost of the Accord could be covered by a “very small increase . . . something like 2¢ per T-Shirt” when spread across all factories.²⁰⁵ After years of profiting from Bangladeshi suppliers, global retailers should be willing to take on relatively minor losses to create safe work environments. The more retailers that participate, the lower the financial burden for all involved, so it is beneficial for as many retailers as possible to join the Accord.

The absence of major American retailers is one of the primary weaknesses of the Accord. Citing concerns about liability, American retailers²⁰⁶ put forth their own plan, the Alliance for Bangladesh Worker Safety, Inc. (Alliance).²⁰⁷ In broad terms, the Alliance is very similar to the Accord. It sets up a system of improvements to be implemented over five years, such as

²⁰¹ *See id.*

²⁰² *See Rahman & Langford, supra* note 194, at 89–91.

²⁰³ The Editorial Board, *A Promising Approach to Factory Safety*, N. Y. TIMES (Jul. 11, 2013), <http://www.nytimes.com/2013/07/12/opinion/a-promising-approach-to-factory-safety.html>.

²⁰⁴ Greenhouse, *supra* note 19.

²⁰⁵ Karen McVeigh, *Major US Names Missing as Retailers Sign Deal to Improve Bangladesh Safety*, THE GUARDIAN (Jul. 8, 2013, 5:51 PM), <http://www.theguardian.com/business/2013/jul/08/retail-bangladesh-factories-improve-safety-deal> (quoting Christy Hoffman, Deputy General of UNI Global Union).

²⁰⁶ The Alliance currently has 26 members, most notably Costco, Gap, J.C. Penney, Macy’s, Sears, Target, and Wal-Mart. *About the Alliance*, ALLIANCE FOR BANGLADESH WORKER SAFETY, <http://www.bangladeshworkersafety.org/about/about-the-alliance> (last visited Sept. 14, 2014).

²⁰⁷ Members Agreement of The Alliance for Bangladesh Worker Safety, Inc., Jul. 10, 2013, *available at* <http://www.bangladeshworkersafety.org/files/Alliance-Member-Agreement-FINAL.pdf> [hereinafter Alliance Agreement].

inspecting all factories,²⁰⁸ creating remediation plans for workers, providing worker training, and making factory and inspection data transparent and available.²⁰⁹ The primary differences are in the makeup of the membership, funding, and how members are bound to the agreement. The only members of the Alliance are retailers.²¹⁰ The Accord, however, divides power between retailers and unions.²¹¹ This is especially important with respect to the inspection process, because it means the Accord's inspection team is accountable to workers and retailers, whereas the Alliance inspector is more similar to the previous system of internal auditing.²¹² Partnering with unions gives the Accord checks and balances within itself, rather than just outside monitoring of unilateral action.

The Alliance is funded through member contributions.²¹³

²⁰⁸ *About the Alliance*, *supra* note 206 (listing membership at approximately 700 factories); see also ALLIANCE FOR BANGLADESH WORKER SAFETY, PROTECTING THE LIVES OF BANGLADESH GARMENT WORKERS: A 6-MONTH PROGRESS REPORT OF THE ALLIANCE FOR BANGLADESH WORKER SAFETY (2014), available at <http://www.bangladeshworkersafety.org/en/media-center/alliance-publications/159-6-month-report> (reporting that as of February 2014, 222 factories (31%) have been inspected, and they will inspect 100% of the listed factories by July 2014); see also Ellen Tauscher, Chairman of the Board of Directors Alliance for Bangladesh Worker Safety, Prospect for Democratic Reconciliation and Worker's Rights in Bangladesh, Testimony Before the U.S. Senate Committee on Foreign Relations (Feb. 11, 2014), available at <http://www.bangladeshworkersafety.org/en/media-center/alliance-publications/85-semi-annual-report> (testifying that since there is a 50% overlap between factories on the Alliance list and on the Accord's list, both organizations have committed to publicizing and sharing inspection data as it comes out to ensure every factory is inspected).

²⁰⁹ Greenhouse & Clifford, *supra* note 20.

²¹⁰ *About the Alliance*, *supra* note 206.

²¹¹ Accord, *supra* note 7.

²¹² Press Release, Clean Clothes Campaign, Safety Scheme Gap and Wal-Mart Only 'Empty Promises' (Jul. 10, 2013), available at <http://www.cleanclothes.org/news/press-releases/2013/07/10/safety-scheme-gap-and-walmart>.

²¹³ Alliance Agreement, *supra* note 207, at art. 2.2 ("Members will create a fund . . . to underwrite Factory-based fire and building initiatives [T]he Alliance's goal is to attract membership which will approach or exceed total contributions of fifty million dollars."); see also Alliance Agreement, *supra* note 207, at Attachment 1 (stating that contributions are made based on the dollar value of merchandise exported from Bangladesh each year, not to exceed \$1,000,000 per member); see also Greenhouse & Clifford, *supra* note 20 (projecting that this system should provide \$42 million during the 5 years the plan is in effect); see also Alliance Agreement, *supra* note 207, at art. 2.2(d) (enumerating, like the Accord, a provision for soliciting funds from third parties such as governments, trade associations, NGOs, the ILO, and the World Bank).

However, these funds are only intended to finance inspections, training, and remediation efforts.²¹⁴ The Alliance has no provisions for guaranteeing that factory upgrades will occur. Unlike the Accord, which creates a binding responsibility on a retailer to ensure there are funds for repairs (through a variety of means, but if necessary, direct funding), the Alliance only creates a system of low interest loans called Affordable Capital for Building Safety (ACBS).²¹⁵ So far, members have pledged \$100 million in loans,²¹⁶ however, the member agreement specifically states “[p]articipation in ACBS is not a condition of membership in the Alliance”—meaning a member could retract funds with no penalty.²¹⁷ While the Accord makes all of its commitments binding through its arbitration provision, the only penalty that affects an Alliance member is a “termination fee.”²¹⁸ If a member leaves before two years into the five-year commitment, they are still responsible for paying the remainder of their dues (which would be \$5 million at most).²¹⁹ Leaving after two years, but before five years, incurs a one-time penalty equal to the member’s contribution for the previous year.²²⁰ If a member stops sourcing from Bangladesh, it may leave the alliance without paying any fees. Unlike the Accord, there is no provision requiring members to maintain order volumes at factories trying to improve.²²¹

The Alliance agreement is filled with good intentions, but lacks enforcement power. Although the Alliance is more ambitious and public than previous efforts, it is still essentially the same strategy used in the past: self-policing. Unions and labor focused NGOs have been very critical of the alliance.²²² The Clean Clothes

²¹⁴ Alliance Agreement, *supra* note 207, at art. 2.2.

²¹⁵ *Id.* at art. 2.3.1.

²¹⁶ *Clothing Firms in Bangladesh: Accord, Alliance or Disunity?*, THE ECONOMIST (Jul. 13, 2013), <http://www.economist.com/news/business/21581752-transatlantic-divide-among-big-companies-may-hinder-efforts-improve-workers-safety>.

²¹⁷ Alliance Agreement, *supra* note 207, at art. 2.3.1.

²¹⁸ *See id.* at art. 9.

²¹⁹ *Id.* at art. 9.1.

²²⁰ *Id.* at art. 9.2.

²²¹ *Id.* at art. 9.3.

²²² *See* Carey L. Biron, *U.S. Retailers Unveil Contentious Bangladesh Safety Agreement*, INTER PRESS SERVICE (Jul. 11, 2013), <http://www.ipsnews.net/2013/07/u-s-retailers-unveil-contentious-bangladesh-safety-agreement/> (noting that the AFL-CIO, Labor Rights Forum, the Workers’ Consortium see the Alliance as ignoring worker input

Campaign, a signing witness to the Accord, called the Alliance "empty promises" and attacked the Gap's and Wal-Mart's history of promised but undelivered repairs, saying they "have no credibility left on this issue."²²³ The alliance maintains that they are committed to helping their suppliers but did not want to create a binding agreement, because they were worried about creating liability for supplier actions in Bangladesh.²²⁴

Alliance members are afraid that legally binding themselves to their suppliers would allow an injured worker to sue them in the United States.²²⁵ However, after the decision in *Kiobel*, it seems less likely that this could happen when the injury occurs outside the United States, given the presumption of extraterritoriality espoused by the Court. It is unlikely that a U.S. corporation, contracting with a foreign third party supplier for merchandise, would be an instance that "touch[ed] and concern[ed] the territory of the United States . . . with sufficient force to displace the presumption."²²⁶ Were something to go wrong, it would be a foreign national, injured in a foreign country, by a foreign wrongdoer, linked to the United States only through a business relationship. But, having an American defendant is insufficient by itself for ATS. While the four Justices concurring in the judgment argued that there should be jurisdiction under the ATS when the defendant is an American,²²⁷ the majority declined to adopt this view, stating that the ATS was not meant to make "the United States a uniquely hospitable forum for the enforcement of international norms."²²⁸ Even though the United States would have jurisdiction over an American defendant, hearing a case on acts occurring wholly outside the United States would still be extraterritorial application of the ATS and is therefore barred.²²⁹ It

and too weak to create change).

²²³ Press Release, Clean Clothes Campaign, *supra* note 212.

²²⁴ See Greenhouse, *supra* note 19.

²²⁵ See *id.* (noting that Alliance members argue European retailers have a lower threat of litigation since European courts are less hospitable to lawsuits because they "generally prohibit class-action lawsuits, do not allow contingency fees for lawyers who win cases and require losing parties to pay legal fees for both sides.").

²²⁶ *Kiobel*, 133 S.Ct. at 1669.

²²⁷ *Id.* at 1671 (Breyer, J., concurring).

²²⁸ *Id.* at 1668.

²²⁹ See Donald Childress, *Kiobel Commentary: An ATS Answer with Many*

will take a few more test cases to fully flesh out what *Kiobel* means, but for now it seems that U.S. courts will only hear cases where the injury occurs in the United States or a violation of the law of nations occurs in the United States, eventually causing an injury outside the country.²³⁰

Kiobel has focused ATS discussions on the new question of extraterritorial application. With respect to potential litigation for another disaster in Bangladesh, it is important to remember the first requirement the ATS poses: a claim can only proceed if it “seeks to enforce an underlying norm of international law that is as clearly defined and accepted as the international law norms familiar to Congress in 1789 when the ATS was enacted.”²³¹ The Supreme Court has set the bar for what constitutes a norm of international law quite high. The Court has rejected claims that only appear to be prohibited by an international law or where the principle of an international law could be extended to prohibit the offending conduct, instead requiring that there be an “international law [that] contains a universally accepted rule and defines that rule specifically and uncontroversially to include defendant’s alleged conduct.”²³² The Court did not specify which norms would meet this standard,²³³ but as discussed in Part V, the majority of recent ATS litigation has focused on terrorist attacks, extrajudicial killings, and substantial human rights violations, such as systematic persecution and punishment of minority groups or forced labor. Although the actions of many Bangladesh factory owners have been unconscionable and grossly negligent, it is

Questions (and the Possibility of a Brave New World of Transnational Litigation), SCOTUSBLOG (Apr. 18, 2013, 5:03 PM), <http://www.scotusblog.com/2013/04/kiobel-commentary-an-ats-answer-with-many-questions-and-the-possibility-of-a-brave-new-world-of-transnational-litigation/> (“So, it appears that escaping the presumption against extraterritoriality in the ATS context is not about “who” the defendant is but about “where” the tortious conduct took place.”).

²³⁰ See *id.*

²³¹ *Sexual Minorities Uganda*, 960 F. Supp. 2d at 315 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)) (“The analysis, therefore, must proceed in two steps: first, was there a violation of an international norm . . . ? Second, if so, is the crime against humanity within the limited group of claims for which the ATS furnishes jurisdiction.”).

²³² Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT’L L. 353, 362 (2011) (citing *Sosa*, 542 U.S. at 737).

²³³ Bensimon, *supra* note 193, at 207.

unlikely that even the most unsafe working conditions would meet this standard, presenting further bars to foreign workers suing U.S. corporations under the ATS.²³⁴

There is another theory of liability, though, that says corporations violating human rights overseas could be sued in state courts because states are free to create their own tort law and recognize new causes of action.²³⁵ While it is likely that state courts will refuse to hear cases on injuries occurring outside the United States for the same reasons the Supreme Court found it to be inappropriate, there is the possibility that one state would do so.²³⁶ Until that occurs, it is inappropriate for corporations to mitigate their commitments to responsible supply chain management by crying “liability, liability.” The risk of liability may simply be the cost of an effective approach, as without a binding provision like the Accord’s, internal industry agreements on improving safety will continue to resemble the same ineffective tactics of the last thirty years.²³⁷

VII. Conclusion

The Accord is an important step forward for Bangladesh’s garment industry, because its binding nature and power sharing between unions and international retailers ensure corporate accountability. It is an agreement that brings workers into the solution. Although the binding nature is troublesome to some, it is a key aspect in what makes the Accord unique and likely to succeed. The unfortunate history of Bangladesh’s factory disasters is ample evidence that the old system was not working. Government inspectors were often underfunded and bribed by factory owners or pressured by politicians to look the other way.

²³⁴ See *supra* note 224 and accompanying text.

²³⁵ Rich Samp, *Supreme Court Observations: Kiobel v. Royal Dutch Petroleum & the Future of Alien Tort Litigation*, FORBES (Apr. 18, 2013, 10:51 AM), <http://www.forbes.com/sites/wlf/2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-alien-tort-litigation/>; see generally Donald E. Childress, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709 (2012) (arguing that the growing hostility towards ATS cases in the federal courts will push creative plaintiffs into state courts).

²³⁶ See generally Childress, *supra* note 229 (discussing the possibility of transnational cases in state court and the associated issues of choice of law, due process, and federalism that will arise).

²³⁷ See Greenhouse, *supra* note 19.

Internal audits of suppliers by retailers would often miss those factories most at risk (smaller subcontractors hired by major suppliers), and even when a substandard factory was found, the result was a termination of the business relationship, which may give the retailer a clear conscience but left workers in a building that was still dangerous. Retailers committed to responsible supply chain management should be encouraged to join the Accord. More participating members mean more factories will be covered under its provisions and the costs will be lower for all involved. While the Accord could impose certain liabilities on its U.S. members, in light of the recent ruling in *Kiobel*, this concern seems unfounded. Retailers should not be skeptical in joining this novel approach to workplace safety.

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